

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VASEGA F. TILI,	)	No. C 11-1911 JSW (PR)
	)	
Petitioner,	)	<b>ORDER OF DISMISSAL; GRANTING</b>
	)	<b>LEAVE TO PROCEED IN FORMA</b>
vs.	)	<b>PAUPERIS; DENYING MOTION TO</b>
	)	<b>HOLD IN ABEYANCE</b>
LELAND MCEWEN, Warden,	)	
	)	
Respondent.	)	
	)	(Docket Nos. 2 & 3)

Petitioner, a prisoner of the State of California proceeding pro se, has filed a habeas corpus petition pursuant to 28 U.S.C. § 2254.

Petitioner concedes that he presently has a petition for a writ of habeas corpus pending before the California Supreme Court. The Ninth Circuit has held unequivocally that the habeas exhaustion requirement is not satisfied if there is a pending proceeding in state court, even if the issue the petitioner seeks to raise in federal court has been finally determined by the highest available state court. *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983). This is because the pending state action might result in reversal of the conviction on some other ground, mootng the federal case. *Id.*

The petition is DISMISSED without prejudice to refiling it when no further proceedings are pending in the California state courts. *See id.* (if state court action is pending, claims are not exhausted). In light of this dismissal, Petitioner's motion to hold


1 the petition in abeyance is DENIED. Petitioner's motion for leave to proceed in forma  
2 pauperis is GRANTED.

3 Rule 11(a) of the Rules Governing Section 2254 Cases now requires a district  
4 court to rule on whether a Petitioner is entitled to a certificate of appealability in the same  
5 order in which the petition is decided. Petitioner has failed to make a substantial showing  
6 that a reasonable jurist would find this Court's denial of his claim on procedural grounds  
7 debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Consequently, no  
8 certificate of appealability is warranted in this case.

9 This order terminates docket numbers 2 and 3. The Clerk shall enter judgment  
10 and close the file.

11 IT IS SO ORDERED.

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13 DATED: May 13, 2011

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15 JEFFREY S. WHITE  
16 United States District Judge  
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